NO. **45594-3-II**

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MAGDALENE PAL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Magdalene Pal, was denied an administrative hearing to challenge an agency finding that she neglected a vulnerable adult. The hearing was denied because she filed her hearing request two hours after the close of business on the last day to appeal. The Department of Social and Health Services (DSHS or Department) Adult Protective Services (APS) sent Ms. Pal a notice informing her of the alleged neglect and a form for requesting an administrative hearing. The notice advised Ms. Pal that the appeal would be timely if the Office of Administrative Hearings (OAH) received the completed form no later than thirty days after the notice was mailed to her on January 19, 2012. The hearing request form advised Ms. Pal that she could mail or fax her request to OAH.

It is not contested and the Administrative Law Judge (ALJ) found, that OAH received Ms. Pal's completed appeal form by fax on January 19, 2012. Additionally, she mailed a copy of the completed form to OAH earlier that same day. Although Ms. Pal timely completed all of the steps the Department instructed her to do, the state unfairly and illegally denied her a hearing based on a rule about which she was never informed.

This appeal seeks to ensure that Ms. Pal receives an opportunity to contest the agency finding that she neglected a vulnerable adult for whom

she had been caring. If the administrative decision is upheld, the two hour difference will forever prevent her from earning a living in her chosen profession as an adult care provider, being licensed as an adult family home provider, and working or volunteering in any setting with vulnerable adults or children. Ms. Pal's name will be permanently placed on the Department's Background Check registry, rendering her unable to engage in her customary employment providing care to persons whose personal care is paid for by any state-funded entity. This lifetime bar will happen without Ms. Pal ever receiving a hearing on the merits of her case.

The legal issues concern whether Ms. Pal properly invoked the administrative appeal process; whether she was afforded due process of law; whether she received clear and adequate notice of how to invoke the appeal process; and, what, if any, allowance must be made to ensure she has a fair opportunity to be heard.

This Court should rule that Ms. Pal timely requested a hearing to challenge the APS neglect finding and there was jurisdiction to hear her appeal. In the alternative, the Court should find that Ms. Pal is entitled to a hearing because the notice informing her of the alleged neglect was insufficient to satisfy due process, and/or there was good cause for the late hearing request. The Court should also award Ms. Pal attorney fees and costs pursuant to RCW 4.84.350.

II. ASSIGNMENTS OF ERROR

The trial court erred when it upheld the administrative decision to deny Ms. Pal a hearing to contest the agency finding that she neglected a vulnerable adult when she complied with the instructions for requesting a hearing provided to her by the Department.

The trial court erred when it upheld the administrative decision and failed to find a violation of due process based on the Department's failure to notify Ms. Pal of a 5:00 p.m. deadline for filing her appeal.

The trial court erred when it ruled that substantial compliance does not apply to the process for requesting an administrative hearing to challenge an agency finding of neglect.

The trial court erred when it failed to determine whether there was good cause for a late hearing request under WAC 388-02-0020.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

A. Whether Ms. Pal properly invoked the jurisdiction of OAH to appeal the neglect finding when she faxed and mailed her hearing request to OAH in accordance with the directions provided to her by the Department. CP 24-25, 46-48. (BOA Review Decision and Final Order Conclusion of Law No. 8. Administrative Hearing Initial Order to Dismiss Proceedings Conclusions of Law.)

B. Whether the notice of the Department's finding of neglect violates due process because it failed to inform Ms. Pal that the deadline for filing the hearing request was anything other than thirty calendar days.

C. Whether Ms. Pal substantially complied with the procedure for requesting a hearing to contest the neglect finding.

D. Whether there was good cause for a late hearing request.

E. Whether Ms. Pal is entitled to attorney fees and costs pursuant to RCW 4.84.350.

IV. STATEMENT OF THE CASE

Magdalene Pal is an independent adult care provider who cared for a vulnerable adult in her home. On December 20, 2011, DSHS mailed her a letter[1] notifying her that it had determined she neglected that same vulnerable adult. CP 79-81. The Department mailed the notice four months after the alleged incident of neglect, during which time the vulnerable adult remained under Ms. Pal's care. CP 83-84. Ms. Pal adamantly denied any neglect and requested an administrative hearing to challenge the determination.[2]

The notice the Department sent to Ms. Pal stated as follows:

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[1] Hereinafter referred to as "the notice."

[2] APS alleged that Ms. Pal left a vulnerable adult to self-administer his medications while she went out of town for a few days. CP 78. The vulnerable adult's APS case manager submitted a declaration supporting Ms. Pal's version of events. CP 14, 40.

> At this time you have a right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240. If you request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to: . . . . [Original emphasis.]
>
> CP 79.

The notice provided Ms. Pal with the address of the Vancouver Office of Administrative Hearings. *Id.* at 80. A form entitled "Request for Adult Protective Services Hearing" was included with this notice. CP 64-65, 82, 85. The form required Ms. Pal to provide several pieces of information, including her reasons for appeal, her name, contact information, whether she was going to represent herself at the hearing, and when she was notified of the APS decision. The form told Ms. Pal she could either mail *or* fax the request. The form did not say it must be mailed to OAH if Ms. Pal elected to file by fax, nor did it say the form must be received by the close of business or provide a listing of those hours. CP 65, 82, 85.

Ms. Pal faxed her request for a hearing to the Vancouver OAH on January 19, 2012 at 7:16 p.m. CP 59-60, 85-87. Ms. Pal wrote on the fax

cover sheet that: "You have a fax, & a mail on way [sic]." CP 87. DSHS filed a motion to dismiss Ms. Pal's appeal for lack of jurisdiction. CP 69-71. On March 16, 2012, the ALJ held a hearing on the motion to dismiss. At the hearing, Ms. Pal testified she mailed her request for an appeal on January 19, 2012 between 3:00 p.m. and 4:00 p.m. CP 114, 121. She faxed the request just after 7:00 p.m. the same day. CP 114, 122. The Department did not deny that OAH actually received the fax on January 19, 2012 at 7:16 p.m. The ALJ found accordingly. CP 46-47.

Despite this finding, the ALJ granted the Department's motion to dismiss concluding that Ms. Pal failed to timely file her appeal because she did not deliver it to OAH during business hours. CP 47. Ms. Pal filed a petition for review of the ALJ's decision before the Department's internal Board of Appeals (BOA). CP 35-43. On December 28, 2012, the BOA affirmed the ALJ's decision dismissing Ms. Pal's appeal. The BOA concluded the ALJ lacked jurisdiction to hear the case on its merits because 1) OAH did not receive Ms. Pal's request for a hearing until after the regulatory time period for filing such a challenge had run, and 2) OAH never received a mailed copy of the request. CP 24-25.

On January 2, 2013, the Department requested reconsideration of the BOA's decision to correct typographical errors. CP 19. On January 16, 2013, the BOA granted reconsideration and corrected the

typographical errors but otherwise made no changes to the decision dismissing the appeal. CP 2-4.

On February 13, 2013, Ms. Pal filed a petition for judicial review in the Clark County Superior Court pro se. Ms. Pal was unrepresented by counsel throughout the entire administrative process. The court denied her petition and upheld the BOA's finding that her request for a hearing was untimely. CP 158-159.

Ms. Pal then timely filed this notice of appeal.

V. ARGUMENT

A. THIS APPEAL IS SUBJECT TO *DE NOVO* REVIEW.

Judicial review of administrative agency orders is governed by the Administrative Procedure Act (APA.) *Hardee v. State of Washington, Dep't of Soc. & Health Serv.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011). The APA provides nine grounds for challenging an agency decision. RCW 34.05.570(3). Under the APA, "the court shall grant relief from any agency order ... only if it determines that [in relevant part]:"

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> ...
>
> (d) The agency has erroneously interpreted or applied the law;
>
> ...

(f) The agency has not decided all issues requiring resolution by the agency.

RCW 34.05.570. "The party challenging an agency decision has the burden of demonstrating the invalidity of the agency's action." *Hardee,* 172 Wn.2d at 6. This court stands in the same position as the Superior Court when reviewing an administrative decision. *Id*

At issue in this appeal are the interpretation and application of the language of regulations, a determination of whether the notice of how to appeal an agency finding was sufficient to satisfy due process, and whether there is good cause under the regulations that apply to DSHS hearings to grant Ms. Pal a hearing in any event. These issues, respectively, involve pure questions of law or mixed questions of law and fact. They are therefore subject to *de novo* review. *Jackman v. State, Dept. of Social and Health Services*, 31 Wn.App. 526, 528, 643 P.2d 889 (1982); *Thurston County v. Western Washington Growth Management Board,* 164 Wn.2d 329, 341, 190 P.3d 38 (2008).

B. UNDER WAC 388-71-01240, MS. PAL'S HEARING REQUEST WAS TIMELY FILED ON THE THIRTIETH DAY FROM THE DATE THE NOTICE WAS MAILED.

The notice of the administrative finding of neglect was mailed on December 20, 2012. CP 83. Ms. Pal followed the instructions in the notice and appealed the finding by faxing the completed hearing request

form to OAH on January 19, 2013. CP 85-88. The notice specifically referenced WAC 388-71-01240 as the applicable regulation governing the time period in which to appeal.

WAC 388-71-01240 sets a time frame of 30 calendar days to request a hearing. The WAC reads in relevant part:

> How does an alleged perpetrator request an administrative hearing to challenge an APS finding of abandonment, abuse, financial exploitation or neglect?
>
> (1) To request an administrative hearing the alleged perpetrator must send, deliver, *or fax* a written request to the office of administrative hearings. *OAH must receive the written request within thirty calendar days of the date the department's letter or notice is mailed* or personally served upon the alleged perpetrator, whichever occurs first. If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day. [Emphasis added.]
>
> WAC 388-71-01240.

Likewise, the notice the Department sent to Ms. Pal included the same time frame to appeal "within 30 calendar days" without limit or qualification. The notice says specifically:

> At this time you have a right to request an administrative hearing to challenge APS' initial finding. Your hearing rights are described in RCW 34.05, WAC 388-02, and WAC 388-71. *To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings (OAH). OAH must receive your written request within 30 calendar days of the date this letter of notice was mailed to you, or within 30 calendar days of the date this letter of notice was personally served upon you, whichever occurs first according to WAC 388-71-01240.* If you

> request a hearing by fax, you must also mail a copy of the request to OAH on the same day. To request an administrative hearing you may complete the enclosed form and mail it to:
>
> Office of Administrative Hearings
> 5300 MacArthur Boulevard, Suite 100
> Vancouver, WA 98661
>
> [Italic emphasis added, underline in original.]
>
> CP 79-80.

WAC 388-71-01240 was the only regulation Ms. Pal was directed to in the notice.

Regarding a "calendar day" time limit, the Washington Supreme Court has held "[a] day is commonly defined as the 24-hour period beginning at midnight," citing Webster's Third New International Dictionary of the English Language 578 (2002) (defining "calendar day" as "a civil day: the time from midnight to midnight"). *Troxell v. Rainier School Dist. No. 307,* 154 Wn.2d 345, 111 P.3d 1173 (2005) (italics in original); *Christensen v. Ellsworth,* 162 Wn.2d 365, 173 P.2d 228 (2007). Cf. *In re Marriage of Hansen,* 81 Wn.App. 494, 499, 914 P.2d 799 (1996) ("At common law, a day was defined as the period from midnight to the next and any portion of the day was generally disregarded.").

Ms. Pal reasonably relied on the generally accepted definition of a "calendar day" and faxed her hearing request to the Vancouver OAH

office at 7:16 p.m. on the thirtieth day. A plain reading of the notice (even with consultation to the specifically cited WAC) indicates a request for an administrative hearing should be mailed, delivered or faxed to the referenced OAH no later than the thirtieth calendar day from the date of the notice. Nothing in the language of the notice or WAC suggests the thirtieth calendar day was anything other than by midnight of the thirtieth day – in this case January 19, 2012.

Moreover, nothing in either the notice or the request for hearing form indicated the request must be filed by 5:00 p.m. on the thirtieth calendar day. Ms. Pal followed the explicit instructions on the form. She should be able to rely on the plain language of the notice (and referenced regulation) to understand and expect her faxed request for hearing to the identified Vancouver OAH at 7:16 p.m. on January 19, 2012 was timely. Because Ms. Pal timely filed the hearing request, she is entitled to a hearing on the merits to defend herself against the allegations of neglect in this case.

C. A MAILED COPY OF A TIMELY FAXED HEARING REQUEST DOES NOT NEED TO BE RECEIVED BY OAH FOR JURISDICTION TO ATTACH.

Both the notice and WAC 388-71-01240 instructed Ms. Pal to mail her appeal request to OAH if she requested her hearing by fax. At the hearing held to consider the Department's motion to dismiss, Ms. Pal

testified repeatedly that she mailed her request for hearing to OAH on the same day she faxed the request. CP 108-109, 111-114, 117, 121-122, 127.

> ALJ: "So the first question, Ms. Pal, did you read the – that notification letter to you from Ms. Petshow? CP 108.
> Pal: "I did read the letter, and on the 19th was when I sent my, uh, fax from FedEx. The same day, I had also mailed by mail a document to the Department."
> ALJ: "...Now, the next day is the 19th. And what's the first thing you do that day with regard to this appeal?"
> Pal: "I mail in a copy."
> ALJ: "What – you mailed—you mailed a copy of your appeal—.
> Pal: "Yeah."
> ALJ: "—to my office?"
> Pal: "Yeah."
> ALJ : "About what time of the day did you do that?"
> Pal: "Um, I want to say it was like, uh—it was mid-afternoon, like three, four p.m." CP 121.

Ms. Pal's fax cover sheet to OAH also says she mailed the hearing request. CP 87. The ALJ asked whether she sent the letter by certified mail, and she testified she did not. CP 111-112. However, there is no requirement the hearing request be sent by certified mail. Nor is there any requirement a mailed copy of a faxed request actually be received.

The ALJ made no finding that Ms. Pal was not credible in her testimony. The BOA simply found "the OAH did not receive any mailed copy of the Appellant's appeal." CP 22 (Review Decision, Finding of Fact No.7). The notice informed Ms. Pal that

> To request an administrative hearing you must send, deliver or fax a written request to the Office of Administrative Hearings. OAH must receive your written request within 30 calendar days of the

> date this letter of notice was mailed to you or within 30 calendar days of the date this letter of notice was served upon you, whichever occurs first according to WAC 388-71-01240. [Original emphasis.]
>
> CP 79-80.

The structure of the notice demonstrates that the only jurisdictional requirement is the thirty calendar day time limit within which to "send, deliver, *or fax* [emphasis added]" the written request for a hearing.

The next sentence of the notice informed Ms. Pal that "[i]f you request a hearing by fax, you must also mail a copy of the request to OAH on the same day." This information appears to have its basis in WAC 388-71-01240(1), which reads: "If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day." The mailing requirement is not jurisdictional. By their terms, the regulation and notice state a hearing may be requested *by fax*. The regulation and notice simply ask that a *copy* of the request be mailed – but it is the request itself that OAH must receive within 30 calendar days from the date of the letter. If the faxed request is received within thirty calendar days, the request is timely.

Because neither the notice nor WAC 388-71-01240 requires a mailed request following a faxed request be received at all, the mailing is redundant. One can surmise the intent of the requirement is to insure

against fax errors or lack of readability of a faxed document. The requirement of a redundant mailing should not be construed as jurisdictional, and it should not be a bar to obtaining a hearing prior to suffering the devastating impacts of an APS neglect finding.

In any event, the evidence that Ms. Pal mailed a copy of her request on the same day she faxed it is undisputed. She testified repeatedly that she put the copy of the hearing request in the mail between 3:00 p.m. and 4:00 p.m. on January, 19. She also faxed the request on the same day. Thus, Ms. Pal complied with both the instructions of the notice and the explicit language of WAC 388-71-02140. There is no basis for OAH to have dismissed her appeal.

D. THE NOTICE VIOLATES DUE PROCESS BECAUSE IT FAILED TO INCLUDE ANY DEADLINE BY WHICH TO FILE THE HEARING REQUEST OTHER THAN WITHIN THIRTY DAYS.

The notice of the finding sent to Ms. Pal did not inform her that the deadline or process for filing her hearing request to challenge the neglect finding was anything other than 30 calendar days. However, in concluding Ms. Pal's hearing request was untimely, the ALJ cited WAC 388-02-0070(3):

> **What is filing?**
> (1) Filing is the act of delivering documents to OAH or BOA.
> (2) The date of filing is the date documents are received by OAH or BOA.

(3) Filing is complete when the documents are received by OAH or BOA during office hours.

The trial court further relied on WAC 388-02-0035, which provides:

(1) When counting days to find out when a hearing deadline ends under DSHS rules or statutes:
(a) Do not include the day of the action, notice, or order. For example, if a hearing decision is mailed on Tuesday and you have twenty-one days to request a review, start counting the days with Wednesday.
(b) If the last day of the period ends on a Saturday, Sunday or legal holiday, the deadline is the next business day.
(c) For periods of seven days or less, count only business days. For example, if you have seven days to respond to a review request that was mailed to you on Friday, May 10, the response period ends on Tuesday, May 21.
(d) For periods over seven days, count every day, including Saturdays, Sundays, and legal holidays.
(2) The deadline ends at 5:00 p.m. on the last day.
(3) If you miss a deadline, you may lose your right to a hearing or appeal of a decision.

For reasons set forth below, it is apparent these regulations are not intended to modify WAC 388-71-01240. WAC 388-02 governs the process by which DSHS administrative hearings are held, not whether jurisdiction to conduct a hearing is invoked in the first instance. Indeed the stated purpose of WAC Chapter 388-02 is described as the

> [G]eneral procedures that apply to the resolution of disputes between you and the various programs within [DSHS]. The chapter does not change, modify, *or limit* requirements imposed by the constitution, statutes or other rules. [Emphasis added.]
>
> WAC 388-02-0005.

Subsections (2) and (3) of WAC 388-02-0005 provide as follows:

> (2) Nothing in this chapter is intended to affect the constitutional rights of any person *or to limit or change additional requirements imposed by statute or other rule. Other laws or rules determine if you have a hearing right, including the APA and DSHS program rules or laws.*
>
> (3) Specific DSHS program hearing rules prevail over the rules in this chapter.
>
> Emphasis added.

Rules of construction also lead to the conclusion the 5:00 p.m. deadline does not modify or limit the calendar day in WAC 388-71-01240. The applicable rule of statutory construction is that a special provision as to a particular subject-matter is to be preferred to general language, i.e. *specialia generalibus derogant. Blue Mountain Service Corp. v. Zlateff,* 53 Wn. App. 690, 769 P.2d 883 (1989). In this case, the general references to whole chapters of the RCW and WAC cannot trump the specific reference and language of WAC 388-71-01240 cited in the notice to provide the time frame in which a hearing must be requested. Moreover, the court must construe any ambiguity in the regulations to meet the mandates of due process. *Ryan v. Dept. Social and Health Services,* 171 Wn. App. 454, 467, 287 P.3d 629 (2012) (construing method of service regulation WAC 388-71-01210); cf. *Schroeder v. Hegstrom,* 590 F. Supp. 121, 127 (D. Or. 1984) (construing ambiguous notice regulations for changes in benefits).

By virtue of the explicit language above, specific DSHS program hearing rules prevail over the rules in WAC 388-02. The specific APS hearing rule that applies to APS findings is WAC 388-71-01240. Neither WAC 388-02-0070 or 0035 modifies or limits the time to appeal an APS finding. However, if this court finds the appeal deadline is something other than what the specific, cited regulation and notice sent to Ms. Pal says, then the court must find that the notice violates due process.

1. Due Process Requires that Persons Against Whom a Finding of Neglect is Made Get Adequate Notice of the Allegation and of How to Challenge It.

State courts have long held that state action imposing a stigma or altering an individual's ability to work in a chosen field implicates liberty interests subject to the requirements of due process. *Ryan v. Dept. of Social and Health Services,* 171 Wn.App. at 471 (state administrative finding of abuse or neglect of a vulnerable adult under WAC 388-71 is subject to due process). There are fundamental requisites of due process. One is "'the opportunity to be heard.'" *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914).'"Another is "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

At a minimum, the due process clause of the Fourteenth Amendment of the United States Constitution demands that a deprivation of property be preceded by "'notice and opportunity for hearing appropriate to the nature of the case.'" *Mullane,* 339 U.S. at 313, 70 S.Ct. 652. This opportunity "'must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U. S. 545, 552, 85 S. Ct. 1187, 14 L. Ed.2d 62 (1965).

The minimum requirements of due process include notice of adverse action and procedural rights, including any deadline and process for appeal. *Goldberg v. Kelly,* 397 U. S. 254, 261, 90 S. Ct. 1011, 25 L. Ed.2d 287 (1970); See, *e.g. McConnell v. City of Seattle,* 44 Wn.App. 316, 324, 722 P.2d 121 (1986) (regarding termination of tenured public employee's right to appeal, citation to applicable statute is "not preferable to express notification of appeal deadline.") Courts have held that a citation to a specific statute containing a time limit for an administrative appeal in a public employment context is sufficient to meet the test of due process. *Payne v. Mount,* 41 Wn. App. 627, 635, 705 P.2d 297 (1985).

In this case, the Department arguably met the minimum requirements of due process by inclusion of a specific appeal deadline (thirty calendar days) and reference to WAC 388-71-02140. However, if the appeal deadline is something other than what the notice says, the

notice is at best ambiguous and at worst misleading. In either event, the notice violates due process.

2. The Notice Either Does Not Include a 5:00 p.m. Limit on the Time Frame to Request a Hearing or is Wholly Ambiguous as to How to Make a Timely Request.

If the Court finds that the time limit for Ms. Pal to appeal under WAC 388-71-01240 was modified and limited by WAC 388-02-0035 and/or 388-02-0070(3), Ms. Pal was denied due process because the Department never notified her of the deadline to appeal. The notice informed Ms. Pal that her "hearing rights [were] described in RCW 34.05, WAC 388-02, and WAC 388-71." But reference to whole chapters of a regulation or statute is not sufficient notice, especially in light of reference to the specific regulation governing the time frame for APS hearings (WAC 388-71-01240).

As explained above, citation to a specific applicable statute containing an appeal deadline has been held to meet the minimum requirements of due process. *Payne,* 41 Wn. App.at 635; *McConnell v. City of Seattle*, 44 Wn. App. at 325 (providing copies of the applicable appeal procedures satisfied due process.) However, citations to an entire chapter of regulations, rather than to those provisions that are specifically applicable have been held to violate due process. *Rodriguez v. Chen,* 985 F. Supp. 1189 (D.C. Ariz. 1996) (citation to general chapter or

inaccessible legal references is not adequate notice; citation to law in notice to benefits recipient must be accurate and tailored to the individual case).

In *Rodriguez,* the district court reviewed the adequacy of notice given to low-income persons whose benefits were terminated based on the state's calculation of household income. Citing *Goldberg,* 397 U.S. 267 for the due process right of pre-termination notice and hearing required prior to deprivation of public benefits, the federal court ruled that "[p]roviding incorrect, cryptic or inaccessible citations without further guidance to low-income individuals is providing no guidance at all." *Rodriguez,* 985 F. Supp. at 1196. "While citing to the general provisions is rudimentary, the applicable provision as applied to the particular case is mandatory." *Id.* Cf. *Elkins v. Dreyfus,* 2011 WL 3438666 (W.D. WA 2011) (in which the federal District Court of Western Washington found that the State denied due process when its notices terminating Disability Lifeline benefits did not include copies of cited regulations or any way to access them).[3]

In this case, the Department provided no notice that a "calendar day" was somehow limited to 5:00 p.m. There is no reference to WAC 388-02-0035 or WAC 388-02-0070(3) in Ms. Pal's notice. Referencing

[3] *Elkins v. Dreyfus* is cited as an example of how federal courts have resolved similar types of notice issues in the public benefits context.

various entire chapters of the Revised Code of Washington and the Washington Administrative Code, without reference to a specific provision or the precise language of the statute or rule or providing any way to access the information, does not provide adequate notice. *Rodriguez,* 985 F. Supp. at 1196.

Given the importance of making a timely request for a hearing and the devastating impact of failing to do so in this case, if the Department intended the 5:00 p.m. deadline to apply, it should have explicitly notified Ms. Pal of that limitation. Having not done so, it cannot now claim that her request for a hearing was untimely.[4] *Ryan v. Dept. Social and Health Services,* 171 Wn. App. at 473.

3. Failure to Grant a Hearing Based on Non-Compliance with an Ambiguous Notice of How to Invoke the Hearing Process Denies Due Process of Law.

As set out above, failure to provide adequate notice of adverse state action and how to challenge it denies due process of law. *See Speelman v. Bellingham/Whatcom County Hous. Auth.,* 167 Wn. App. 624, 273 P.3d 1035 (2012). Federal courts have long held that a state

[4] The fact that the specific WAC citation (388-71-01240) is in the sentence that discusses how to request an administrative hearing and follows the sentence that informs the recipient how to request a hearing, reasonably leads one to assume this is the controlling provision. If some provision otherwise found in some part of the RCW or WAC chapters noted in the prior sentence limits the time line for requesting a hearing, the notice is misleading. Receipt of misleading or contradictory messages from the Department, which prevents the recipient from understanding how to appeal, is a basis for good cause to grant a hearing. See *Scully v. Emp't. Sec. Dep't.*, 42 Wn. App. 596, 604,712 P.2d 870 (1986). See discussion *infra.*

agency's failure to give adequate notice of adverse action affecting significant interests invalidates the agency's action. *Turner v. Ledbetter,* 906 F.2d 606, 609 (11th Cir. 1990); *Schroeder,* 590 F. Supp. at 121 and cases cited therein. It is the State's burden to prove that the notice complies with due process. *Id.* Determining whether notice fails to comply with due process requires a court to balance the interests at stake for the individual, the risk of an erroneous deprivation resulting from the process (or notice) used, the probable value of additional or different procedural safeguards, and the governmental interest in the current procedures. *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S. Ct. 893, 902-903, 47 L. Ed.2d 18 (1976).

Ms. Pal has a significant interest at stake in this case. In contrast, the Department's interest is limited. Similar to Ms. Pal's case, the Department, in *Ryan v. Dept. of Social and Health Services*, alleged that Ms. Ryan abused a vulnerable adult. The Court of Appeals determined that an alleged perpetrator of such abuse has "a significant interest in a damaging, irreversible, publicly available finding of wrongdoing." 171 Wn. App. At 471. The *Ryan* court also found that the Department had, at best, a limited interest in adding a final finding to its registry based on a default finding against an accused individual because of its ability to act on initial reports and substantiated findings *Id.*

The risk of erroneous deprivation to Ms. Pal is extreme given the ambiguous notice she received from the Department. If the 5:00 p.m. deadline for requesting a hearing in fact exists, including this information in the notice to persons subject to these determinations is a crucial procedural safeguard. There is no governmental interest in refusal to do so. Because the notice was not adequate, the final order should be void and this case remanded for a hearing on the merits.

E. MS. PAL SUBSTANTIALLY COMPLIED WITH THE RULE FOR REQUESTING A HEARING.

Ms. Pal timely faxed her appeal request to OAH and mailed the request the same day. However, if this court somehow finds Ms. Pal did not mail her request and this defect is jurisdictional, the doctrine of substantial compliance still entitles Ms. Pal to a hearing. See *Ruland v. Department of Social and Health Services,* 144 Wn.App. 263, 274, 182 P.3d 470 (2008) (holding that foster parents challenging a finding of neglect substantially complied with the statutory process for seeking review and were entitled to an OAH hearing).

In *Ruland,* the foster parents were subject to two proceedings, one related to termination of their foster license and one related to the department's administrative finding of neglect. They had appealed the license termination but failed to specifically appeal the neglect finding.

OAH held that it lacked jurisdiction to hold a hearing on their challenge to the alleged neglect. The Court of Appeals reversed, holding that in some circumstances "jurisdictional requirements can be satisfied by substantial compliance" as determined on a case-by-case basis. *Ruland,* 144 Wn.App. at 274.

Relying on *In re Saltis,* 94 Wn.2d 889, 895, 621 P.2d 716 (1980), the *Ruland* court distinguished between "defects in service," which nevertheless accomplish the purpose to notify of the intent to appeal, and failure to comply with a statutory deadline. 144 Wn.App. at 274-275. The court ruled that the appellants substantially complied with regulatory requirements despite the lack of a request for a review in each proceeding. *Ruland*, 144 Wn. App. at 275. The court reached this conclusion because the Department had actual notice that the appellants challenged the neglect finding as part of the license termination process, and the failure to request review of the administrative neglect finding neither delayed the process nor prejudiced the Department. *Id.*

In *In re Saltis,* the Washington Supreme Court held that a minor defect in serving a notice of a workers compensation appeal by mail on the Department of Labor & Industries, instead of its Director, as required by statute, did not preclude jurisdiction to hear the appeal. 94 Wn.2d 889, 621 P.2d 889. The court held that the direction of the notice of appeal to

the Department, in a manner reasonably calculated to give the Director actual notice, is sufficient to perfect subject matter jurisdiction. *Id.* at 895. In reaching this conclusion, the court specifically disapproved of "slavish adherence" to contrary precedent. *Id.*

Substantial compliance is a flexible doctrine that avoids absurd deprivation of important procedural rights in the face of technical rules of procedure that befuddle even the most conscientious litigant. As the *Saltis* court observed, "In cases considering the court's general jurisdiction... 'substantial compliance' with procedural rules is sufficient, because 'delay and even the loss of lawsuit (should not be) occasioned by unnecessarily complex and vagrant procedural technicalities.'" 94 Wn.2d at 896, citations omitted. *Saltis* stands for the principle that substantial compliance with special jurisdictional notice requirements that satisfies the purpose of providing actual notice of an appeal suffices.

In this case, Ms. Pal faxed her request for an administrative hearing within the regulatory time frame required for appeal. Her uncontroverted testimony establishes she mailed the request the same day, thereby satisfying the letter of WAC 388-71-01240. Even if she failed to mail her request the same day, faxing her request provided actual notice to the Department of her intent to challenge the finding of neglect and substantially complied with the service requirement. There was no delay

in the hearing process or prejudice to the Department because of OAH not receiving her mailed request. Because Ms. Pal substantially (if not actually) complied with the process for requesting a hearing, she is entitled to a hearing on the merits.

The trial court determined substantial compliance is not applicable because it is "impossible" to substantially comply with a statutory time limit. CP 158. The court cited to *Seattle v. PERC,* 116 Wn.2d 923, 928, 809 P.2d 1377 (1991), which involved the City of Seattle's failure to serve its petition for judicial review of the agency decision within the statutory time limit under the Administrative Procedures Act. *Seattle v. PERC* involved a mandatory statutory thirty day time limit to file and serve an appeal under the APA. The respondents were not served until thirty-three days after the PERC decision was issued. There was no alternative method of service permitted or any defect in service that otherwise accomplished in substance "every reasonable objective of the statute." *Id.* at 928.

In contrast, in this case the time frame for filing a request for hearing to appeal an APS finding is not statutory. Rather the time frame is set out in regulation which very clearly states:

> To request an administrative hearing the alleged perpetrator must send, deliver, or fax a written request to the office of administrative hearings. OAH must receive the written request within thirty calendar days of the date the department's letter of notice is mailed or personally served upon the alleged perpetrator,

> whichever occurs first. If the alleged perpetrator requests a hearing by fax, the alleged perpetrator must also mail a copy of the request to OAH on the same day. [Original emphasis.]
>
> WAC 388-71-01240(1).

Under the explicit language of the regulation, the mailing requirement is in the second sentence and does not modify the requirements of the first sentence. The first sentence of the regulation sets out the essential objective to file the hearing request within thirty calendar days. The mailing requirement of the second sentence is a technicality, not dissimilar to the requirement that the L&I Director be served in *Saltis*. While the thirty calendar day deadline is jurisdictional, substantial compliance with the technicalities of perfecting the hearing request does not defeat jurisdiction otherwise obtained.

Ms. Pal substantially complied with the regulatory requirement by faxing her request to OAH on the thirtieth calendar day, regardless of whether she also mailed a copy of her request. Because she substantially complied with the essential objectives of the regulatory process, OAH should not have dismissed her appeal.

F. GOOD CAUSE EXISTS TO GRANT MS. PAL A HEARING TO CHALLENGE THE FINDING OF NEGLECT ON THE MERITS.

Finally, if WAC Chapter 388-02 can be used to defeat Ms. Pal's right to a hearing in this case, so too can it be used to grant her one. WAC

388-02-0020 provides for a hearing even if the request was late if a person has a substantial reason or legal justification for failing to timely respond. Based on the evidence in the record, the Court should find Ms. Pal had good cause and should remand for a hearing on the merits.

The administrative decision failed to mention, let alone determine, whether Ms. Pal established good cause for a late hearing under WAC 388-02-0020. The failure to consider whether good cause exists should result in a remand for an administrative hearing as a matter of law. WAC 388-02-0020 expressly allows for an administrative fair hearing to persons who have failed to timely appear, act, or respond to an agency action when "good cause" exists. WAC 388-02-0020 provides in full:

> What does good cause mean?
>
> (1) Good cause is a substantial reason or legal justification for failing to appear, to act or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.
>
> (2) Good cause may include, but is not limited to the following examples: (a) you ignored a notice because you were in the hospital or otherwise prevented from responding; or (b) you could not respond to the notice because it was written in a language you could not understand.

Circumstances that may constitute "good cause" are not limited to the examples set out in the regulation. WAC 388-02-0020(2); *Puget Sound Med. Supply v. Dep't of Soc. & Health Serv.*, 156 Wn. App. 364, 373, 234

P.3d 246 (2010). In addition, the regulation mandates that Superior Court Civil Rule 60 be used as a guideline to analyze whether good cause exists. WAC 388-02-0020(1).

In *Ryan v. Dept. of Social and Health Services*, the appellant submitted her request for an administrative hearing to challenge the agency's finding that she abused a vulnerable adult nine months after the date of mailing the letter notice. 171 Wn. App. at 466. The Department, in that case, expressly conceded, "an alleged perpetrator's delay in requesting a hearing can be excused by an ALJ for good cause," citing WAC 388-02-0020. *Id.*

Notwithstanding this express legal concession, the BOA Review Decision, in this case, erroneously states "[t]he regulations do not allow a late hearing request to be accepted upon a showing of good cause or reason for such tardiness." Concl. of Law No. 5. CP 23. The ALJ concluded that Ms. Pal's failure to file the hearing request by the close of business constituted a default and resulted in the loss of her right to an adjudicative proceeding citing RCW 34.05.440(1). CP 47.[5]

[5]The only things that changed between the date of the *Ryan* decision on October 25, 2012 and the date of the Review Decision on December 28, 2012, in the instant case, are the passage of two months' time and the fact that Ms. Pal was not represented by counsel in the administrative hearing process. Ms. Ryan was similarly not represented by counsel in the administrative process underlying her appeal, and the ALJ similarly failed to apply the regulatory requirement of "good cause" to her late hearing request, yet the Department conceded the issue on appeal.

Civil Rule 60(b) allows for relief from a judgment, order or proceeding, in part based on mistake, inadvertence, surprise, excusable neglect, or for "any other reason justifying relief from operation of the judgment." CR 60(b)(1)(11). Here, good cause exists to grant Ms. Pal a hearing based on her excusable neglect in either not submitting her request for a hearing timely (if the court determines that faxing at 7:16 p.m. is not timely) and/or not mailing her request for a hearing on the same day she faxed her request (if the court determines she in fact failed to do so).

Good cause also exists to avoid the manifest injustice of depriving Ms. Pal of her livelihood and imposing a stigma without any opportunity to challenge the agency determination. Ms. Pal seeks relief from what amounts to a default finding that she neglected a vulnerable adult.

1. The Administrative Decision Fails to Address the Issue of Whether Ms. Pal Had Good Cause for Making a Late Hearing Request.

Under RCW 34.05.570(3)(f), a court may grant relief from an agency decision where it finds the agency has not decided all issues requiring resolution by the agency. Here, the administrative decision failed to determine whether Ms. Pal had good cause for making the late hearing request.

Ms. Pal was not represented by counsel at the administrative hearing on the Department's motion to dismiss. However, she presented a

defense to the motion to dismiss sufficient to establish good cause for filing the hearing request when she did. Ms. Pal's evidence included the notice she received from the Department, which informed her she had thirty days to file the hearing request and did not include any mention of deadlines other than thirty days. Ms. Pal repeatedly testified she mailed and faxed her request within the timeline provided in the notice she received from the Department.

The record from the administrative hearing establishes Ms. Pal squarely raised the issue of good cause for late filing, even if she did not use that specific language. Because they failed to rule on the issue of good cause, which was required in order to decide whether a hearing should be allowed, the administrative decision is erroneous as a matter of law.

2. Washington Law Liberally Applies Rules Permitting Equity and Vacation of Default Judgments.

Washington courts have long held defaults are a disfavored method of determining rights and obligations. *Morin v. Burris,* 160 Wn.2d 745, 754, 161 P.3d 956 (2007). It is far preferable "to give parties their day in court and have controversies determined on their merits." *Id.* As such, grounds for setting aside a judgment under CR 60(b) are to be liberally determined in furtherance of justice. *Morin v. Burris, 160 Wn.2d at 754.* Evidence and reasonable inferences must be made in a light most

favorable to the CR 60(b) movant. *White v. Holm,* 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

In addition to establishing a CR 60(b) basis for relieving a person from the impacts of an order entered by default, courts have applied a three-pronged test to determine if good cause exists for waiving a time limit imposed for an appeal of an administrative determination: (1) shortness of the delay; (2) the absence of prejudice to the parties; and (3) the excusability of the error. *Scully v. Employment Security Dept.,* 42 Wn. App. 596, 601, 712 P.2d 870 (1986), good cause for filing an unemployment insurance benefits appeal seventeen days late was found to exist due to the appellant's receipt of contradictory notices from ESD and the lack of prejudice to ESD. *Id.* at 603.

In this case, the only delay at issue is the period between 5:00 p.m. and 7:16 p.m. on January 19, 2012. Clearly, the delay in this case was not lengthy or prejudicial to DSHS or OAH. Ms. Pal testified the delay occurred because she was seeking advice and misunderstood the time frame for filing the appeal, believing at first she had until January 20, 2012 to submit her hearing request. CP 110. OAH received the notice on January 19 but date stamped it on January 20. CP 85.

The "late" request caused no delay or prejudice. Given the disfavor with which courts view defaults, the lack of any real delay in

submitting her appeal once the "deadline" passed and the lack of resulting prejudice to DSHS versus the immense harm to Ms. Pal in losing her hearing right, the court should find there is good cause to honor her "late" hearing request.

In the interests of justice, the court should further relieve Ms. Pal of having to prove she mailed her request the same day she faxed it to OAH. First, as set out above, the mailing requirement is redundant and provides no additional protection or notice to the Department of her intent to appeal. It is a technical requirement otherwise satisfied by the Department's affirmation that it received actual notice of her appeal. Second, the "Request for Hearing" form, provided by Respondent, instructed Ms. Pal to "mail or fax" the form to a specified office. Facially, it did not instruct that a timely appeal filing requires *both* mailing and faxing nor did it provide any deadline shorter than midnight of the thirtieth calendar day. Moreover, Ms. Pal testified she mailed the request, and there is no evidence in the record to the contrary.

As relief from default is an equitable remedy in furtherance of the interests of justice, the equities in this case weigh strongly in favor of Ms. Pal and against the Department. Finally, as stated above, the interests of justice are best served when individuals have their "day in court" and determinations as grievous as the one at issue here – whether Ms. Pal can

ever again work in her chosen profession and/or be stigmatized as an abuser – are made on the merits and under the guarantee of due process. The court should find "good cause" for the late request and grant Ms. Pal a hearing in this case.

G. IF SUCCESSFUL, MS. PAL IS ENTITLED TO ATTORNEY FEES PURSUANT TO RCW 4.84.350 AND RAP 18.1.

Pursuant to RAP 18.1, Ms. Pal respectfully requests an award of attorney fees and costs in accordance with RCW 4.84.350. Under RCW 4.84.350(a), "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." A qualified party is a party who has obtained relief on a significant issue that achieves some benefit to the qualified party. RCW 4.84.350(a). Attorney fees shall be set by the court and not exceed $25,000.00. RCW 4.84.350(b). If granted, Ms. Pal will submit a cost bill within ten days of the decision in compliance with RAP 18.1(d).

VI. CONCLUSION

Ms. Pal respectfully asks this court to find the following: (1) her request for a hearing was timely, and there was jurisdiction to hear the appeal; (2) the notice violates due process of law; (3) Ms. Pal had good cause for requesting a late hearing and the BOA and ALJ erred by failing

to either address her good cause argument and/or by failing to find good cause for a late hearing; and (4) she is entitled to attorney fees and costs.

Respectfully submitted this 31st day of January, 2014.

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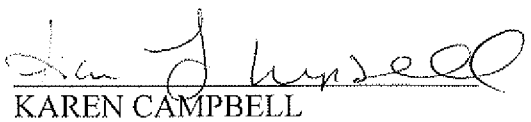

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Counsel for Appellant

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

MAGDALENE PAL, **Appellant,** **v.** **D.S.H.S., STATE OF WASHINGTON,** **Respondent.**	**NO. 13-2-00566-6** **COA NO. 45594-3-II** **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2014, I caused a true and correct copy of the Appellant's Opening Brief to be served on the following in the manner indicated below:

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